(3)

Supreme Court, U.S.
FILED
JUL 19 2004
OFFICE OF THE CLERK

No. 03-1670

IN THE

Supreme Court of the United States

WILLIAM THURSTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF *AMICI CURIAE* FEDERAL DEFENDER OFFICE FOR THE DISTRICT OF MASSACHUSETTS, CRIMINAL JUSTICE ACT BOARD AND NATIONAL ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF PETITIONER

JUDITH H. MIZNER
FEDERAL DEFENDER OFFICE FOR THE
DISTRICT OF MASSACHUSETTS
408 Atlantic Avenue
Boston, MA 02110
(617) 223-8061

For Federal Defender Office for the District of Massachusetts

CHARLES W. RANKIN
RANKIN & SULTAN
One Commercial Wharf, North
Boston, MA 02110
(617) 720-0011

For Criminal Justice Act Board

— Additional Counsel listed on the inside cover —

Dated: July 19, 2004

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

CAROL BROOK
NATIONAL ASSOCIATION OF FEDERAL
DEFENDERS
P.O. Box 22223
Nashville, TN 37202

For National Association of Federal Defenders

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF THE AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THIS CASE RAISES IMPORTANT QUESTIONS CONCERNING THE NATURE AND SCOPE OF APPELLATE REVIEW OF DEPARTURE DECISIONS UNDER THE UNITED STATES SENTENCING GUIDELINES. 4

A. *De Novo* Review of a District Court's Departure Decision Requires Some Degree of Deference to a Sentencing Court's Expertise. 4

B. The Statutory Construction of the Court of Appeals Raises Separation of Powers Concerns. 12

CONCLUSION 13

TABLE OF AUTHORITIES

CASES:

Buford v. United States,
532 U.S. 59 (2001) 3, 8-9, 10

Cooper Industries v. Leatherman Tool,
532 U.S. 424 (2001) 12

Cooter & Gell v. Hartmax Corp.,
496 U.S. 384 (1990) 10

In re Rasbury v. IRS, 24 F.3d 159
(11th Cir. 1994) 12-13

Koon v. United States,
518 U.S. 81 (1996) 3, 4, 8, 9n

Mistretta v. United States,
488 U.S. 361 (1989) 12

Northern Pipeline Construction Co. v.
Marathon Pipe Line Co.,
458 U.S. 50 (1982) 12

Ornelas v. United States,
517 U.S. 690 (1996) 5, 11

United States v. Raddatz,
447 U.S. 667 (1980) 6

United States v. Thurston, 358 F.3d 51
(1st Cir. 2004) 2, 4, 11, 13

United States v. Wells, 519 U.S. 482 (1997) 11

CONSTITUTIONAL PROVISIONS, CODES AND RULES:

United States Constitution

Article III 12
Sixth Amendment 1

United States Code

18 U.S.C. § 3006A 1
18 U.S.C. § 3742(e) ..... *passim*
18 U.S.C. § 3742(e)(3) 4
18 U.S.C. § 3742(e)(3)(iii) 11

United States Sentencing Guidelines

U.S.S.G. § 1A1.1,
Editorial Note, Part A 4 (b) 7
U.S.S.G. § 5K2.0(a)(1) 6
U.S.S.G. § 5K2.0(a)(3) 7
U.S.S.G. § 5K2.0(a)(4) 7

Supreme Court Rules

Rule 37.2 ..... 1n, 2
Rule 37.6 ..... 1n

STATEMENT OF INTEREST OF THE *AMICI CURIAE*[1]

The Federal Defender Office for the District of Massachusetts provides legal representation for indigent defendants charged with federal crimes in the District of Massachusetts. The defense services are rendered by court appointment under the Criminal Justice Act, 18 U.S.C. § 3006A.

The Criminal Justice Act ("CJA") Board consists of ten attorneys appointed by the United States District Court for the District of Massachusetts to advise the District Court on issues relating to implementation of the Criminal Justice Act Plan of 1993. The CJA Board presents educational programs on federal criminal defense practice in order to guarantee that indigent defendants are well-represented. The CJA Board solicits and reviews applications from attorneys who wish to receive appointments under the Criminal Justice Act.

The National Association of Federal Defenders ("NAFD"), is a nationwide, non-profit, volunteer organization whose membership includes attorneys and support staff of the Federal Defender Offices. The NAFD was formed in 1995 to enhance the representation provided under the Criminal Justice Act and the Sixth Amendment to the United States Constitution. One of the NAFD's missions is to file *amicus curiae* briefs to ensure that the position of indigent defendants in the criminal justice system is adequately represented.

From time-to-time, the Federal Defender Office, the CJA Board and the NAFD express their views on issues of concern to the indigent defense bar, the defense bar as a whole, and indigent defendants.

---

[1] Pursuant to Rule 37.2 of the Rules of this Court, letters of consent to the filing of this brief have been submitted to the Court. Pursuant to Rule 37.6 counsel for the *amici* state that no counsel for either party to this matter authored this brief in whole or in part. Furthermore, no persons or entities, other than the *amici*, contributed monetarily to the preparation or submission of this brief.

Review of sentencing decisions under the United States Sentencing Guidelines is a question of exceptional importance to the federal sentencing process. As attorneys representing individuals charged with federal offenses, *amici* have a substantial interest in how the changes in the standard of review of district court sentencing decisions wrought by § 401(d) of the PROTECT Act (Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act, Pub.L.108-21) (codified at 18 U.S.C. § 3742(e)) will be interpreted and applied. The Federal Defender Office in Massachusetts and the CJA Board participated in the proceedings in the court below, filing an *amicus curiae* memorandum in support of petitioner William Thurston's petition for panel rehearing and rehearing *en banc* addressing, *inter alia*, the question of the meaning of the *de novo* standard of review required by § 401(d).

Pursuant to Rule 37.2 of the Rules of this Court, *amici curiae* respectfully submit this brief in support of the petition for a writ of certiorari filed by William Thurston, in Case Number 03-1670.

INTRODUCTION AND SUMMARY OF ARGUMENT

This petition raises important questions concerning the nature and scope of appellate review under section 401(d) of the PROTECT Act (codified at 18 U.S.C. § 3742(e)). That provision changed, *inter alia*, the standard of appellate review of a district court's decision to depart from the otherwise applicable sentencing guideline range from abuse of discretion to *de novo*. The court below held that the *de novo* review imposed by the PROTECT Act precludes any deference to district court findings or conclusions save "findings of historical fact" (*United States* v. *Thurston*, 358 F.3d 51, 77 (1st Cir. 2004). The court of appeals also afforded no weight to the district court's finding that defendant's good works were

the most extraordinary it had seen in over fourteen years of sentencing criminal defendants (*id.*, at 79). *Amici* suggest that such determinations have an impact on every appeal in a criminal case raising issues of departures from the guidelines, that they were wrongly decided and that they should be reviewed by this Court.

De novo appellate review of departures under the United States Sentencing Guidelines does not preclude any and all deference to the district court's application of the guidelines to the facts of the case. Rather, recognition of the "special competence" and "institutional advantages" of the district court in the sentencing arena, described by this Court in cases such as *Koon* v. *United States*, 518 U.S. 81 (1996) and *Buford* v. *United States*, 532 U.S. 59 (2001), mandates that the *de novo* review standard be construed in this context as affording some deference to the district court's application of the guidelines to the facts. Departure decisions are not only fact-intensive, but require comparisons based on a body of knowledge and experience within the particular expertise of the district court.

Construing *de novo* review as requiring the appellate court to ignore the expertise of the district court would also violate the separation of powers doctrine.

ARGUMENT

I. THIS CASE RAISES IMPORTANT QUESTIONS CONCERNING THE NATURE AND SCOPE OF APPELLATE REVIEW OF DEPARTURE DECISIONS UNDER THE UNITED STATES SENTENCING GUIDELINES.

A. *De Novo* Review of a District Court's Departure Decision Requires Some Degree of Deference to a Sentencing Court's Expertise.

The PROTECT Act (Pub.L. 108-21) amended 18 U.S.C. § 3742(e)(3) and the paragraph of that subsection addressing the standard of appellate review. While continuing to direct the court of appeals to give "due regard" to district court credibility judgments and to accept the district court's findings of fact unless clearly erroneous, the amendment changed the standard of review for evaluating the propriety of the bases for a departure. The section now instructs the court of appeals to "review de novo the district court's application of the guidelines to the facts" in assessing the district court's determination that a departure is based on an appropriate factor or that it is justified by the facts of the case. Prior to the amendment, the court of appeals was to give "due deference to the district court's application of the guidelines to the facts" — a standard held by this Court to be abuse of discretion. *See, Koon* v. *United States*, 518 U.S. 81 (1996).

The court of appeals held that the *de novo* review required by the PROTECT Act amendment to 18 U.S.C. § 3742(e) precluded any deference to a district court's finding or conclusion other than to a finding of historical fact (*United States* v. *Thurston*, *supra*, 358 F.3d at 77). Accordingly, the court of appeals gave no deference to the district court's conclusion, based on the court's more than fourteen years of sentencing defendants, that a

downward departure for defendant's exceptional good works was warranted based on "a record of charitable work and community service [,which is] unique, extensive and extraordinary". Indeed, the district court concluded that in his "over fourteen years of sentencing defendants, . . . no one had a more extraordinary devotion to charitable work, community service and especially . . . to his church" (*id.*, at 79). Instead of focusing on the nature of defendant's conduct and evaluating it in the context of the conduct of other defendants, the court of appeals focused on the purpose of the sentencing guidelines to equalize the punishment for "blue collar" and "white collar" crime and defendant's status as a "white collar" criminal to conclude that defendant's good works were not exceptional.

Amici submit that this interpretation and application of the scope of *de novo* review is impermissibly restrictive, ignoring the expertise and special competence of the district court and prior decisions of this Court.

This Court has made clear that a *de novo* standard of review does not flatly preclude any and all circuit court deference to a district court's application of law to the facts of the case. *Ornelas* v. *United States*, 517 U.S. 690 (1996) held that ultimate questions of reasonable suspicion and probable cause for warrantless searches should be reviewed *de novo*. Yet, in explaining how this *de novo* review is to be effected, this Court stated:

> We therefore hold that as a general matter determinations of probable cause should be reviewed de novo on appeal. Having said this, we hasten to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by

> resident judges and local law enforcement officers.
>
> A trial judge views the facts of a particular case in light of the distinctive features and events of the community; likewise, a police officer views the facts through the lens of his police experience and expertise. The background facts provide a context for the historical facts, and when seen together yield inferences that deserve deference. . . . The background facts, though rarely the subject of explicit findings, inform the judge's assessment of historical facts.

Id., 517 U.S. at 699-700. Thus, *Ornelas* makes clear that even under *de novo* review, an appellate court must give some deference to conclusions based upon the background experience and expertise of the district court (as well as, in search situations, to the police officer) whose conclusions are under review.

In *United States* v. *Raddatz*, 447 U.S. 667 (1980) this Court analyzed a provision of the Federal Magistrates Act addressing referral of a suppression motion to a magistrate. While the district court was required to make a *de novo* determination of a magistrate's report, findings and recommendations where objections are made, this Court concluded that in making that *de novo* determination the district court could place whatever reliance it "in the exercise of sound judicial discretion, chose to place on a magistrate's proposed findings and recommendations." (*id.*, at 676.)

Review of departures under the United States Sentencing Guidelines is, like determinations of probable cause, an area where some deference to the findings and conclusions of the district court is essential. Departure jurisprudence is, as the applicable guidelines provisions show, inherently fact intensive. U.S.S.G. § 5K2.0(a)(1) authorizes departures from the applicable guideline

range, generally, where there exists an aggravating or mitigating circumstance

> of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that, in order to advance the objectives set forth in 18 U.S.C. § 3553(a)(2), should result in a sentence different from that described.

Section 5K2.0(a)(3) provides that a departure

> may be warranted in an exceptional case, even though the circumstance that forms the basis for the departure is taken into consideration in determining the guideline range, if the court determines that such circumstance is present in the offense to a degree substantially in excess of, or substantially below, that which ordinarily is involved in that kind of offense.

And § 5K2.0(a)(4) provides that a circumstance in the offender characteristics section of the guidelines or elsewhere identified "as not ordinarily relevant in determining whether a departure is warranted may be relevant to this determination only if such offender characteristic or other circumstance is present to an exceptional degree.". The Background following the application notes recognizes the "integral function" of departures in the sentencing guideline system. As stated in U.S.S.G. § 1A1.1, Editorial Note, Part A 4 (b), discussing departures:

> The Commission intends the sentencing courts to treat each guideline as carving out a "heartland", a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct

> significantly differs from the norm, the court may consider whether a departure is warranted.

These departure provisions require a comparative and evaluative analysis. To determine whether a circumstance is "exceptional", "atypical" or "significantly differs from the norm" the district court must not only make findings concerning the conduct of the defendant being sentenced, but place that conduct in the context of the conduct of other defendants and, perhaps, the broader population to determine whether, evaluating such information and circumstances, a departure is warranted.

Therefore, whether a particular situation is sufficiently "exceptional" to warrant a departure is not a decision made solely on the basis of abstract legal principles and standards; the facts of the particular case and the district court's background knowledge and experience are pivotal to the decision. *See, e.g., Koon* v. *United States*, 518 U.S. 81, 99-100 (1996) ("The relevant question, however, is not . . . 'whether a particular factor is within the "heartland"' as a general proposition, . . . , but whether the particular factor is within the heartland given all the facts of the case.") The amendment to 18 U.S.C. § 3742(e) requiring the court of appeals to determine whether a sentence outside the applicable guideline range is "justified by the facts of the case" plainly requires a fact-bound determination.

This Court has recognized the "institutional advantages" and "special competence" of the district court in making determinations under the sentencing guidelines. *See, e.g., Koon* v. *United States, supra*, 518 U.S. at 98-99 (departures "embod[y] the traditional exercise of discretion by a sentencing court" and call for a district court to make "a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing"); *Buford* v. *United States, supra*, 532 U.S. at

64-65 (relationship of cases for purposes of career offender guideline is an area where district courts have special competence). On the front lines, district courts see many more sentencing guidelines cases than do courts of appeals. Because district court judges have experience in sentencing that appellate court judges ordinarily lack, they are in a far better position to know whether a departure factor truly applies to a defendant, whether circumstances are exceptional or significantly different from the norm. Of course, district court judges are not infallible — trial judges commonly say that sentencing is the most difficult part of a difficult job — but their front-line experience gives their judgment a context that appellate judges lack. In addition, district court judges are, on the whole, far better informed about sentencing than are circuit judges. They attend sentencing institutes, speak about sentencing at legal education programs for lawyers and probation officers, and, perhaps most important, share public-record information about their cases with their colleagues.

In contrast, the courts of appeals generally see only those cases in which a departure has been granted and the government has chosen to appeal, primarily a limited subset of cases deemed extraordinary by the district courts.[2] District courts, therefore, have a vastly broader range of experience for assessing the exceptional or outside the heartland circumstance, an experience

---

[2] Again, as this Court stated in *Koon*, *supra*, 518 U.S. at 98-99:

> Whether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases. District courts have an institutional advantage over appellate courts on making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do.

which, even under a *de novo* review standard, should be respected, not ignored.

Yet, the First Circuit's construction of the *de novo* standard of review set out in the PROTECT Act amendments to 18 U.S.C. § 3742(e) would completely reject that experience as irrelevant.

Not only does the district court have expertise which should be recognized, but decisions resolving fact-intensive determinations provide comparatively less future guidance than those resolving questions and principles of law. As this Court stated in *Buford* v. *United States*, *supra*, 532 U.S. at 65-66, in imposing an abuse of discretion standard for appellate review of a district court's determination as to whether prior convictions were related for purposes of the career offender guideline:

> Nor is that question readily resolved by reference to general legal principles and standards alone. Rather, the question at issue grows out of, and is bounded by, case-specific detailed factual circumstances. And the fact-bound nature of the decision limits the value of appellate court precedent, which may provide only minimal help when other courts consider other procedural circumstances, other state systems, and other crimes.

See also, Cooter & Gell v. *Hartmax Corp.*, 496 U.S. 384, 404 (1990) noting that the more fact-intensive the question, the less the value of appellate court precedent.

Respect for the Congressional imposition of a *de novo* standard of review does not require the draconian interpretation utilized by the court below. Standards of review are not a matter of black and white, bright-line distinctions. Rather, they fall along a spectrum gradated by the nature of the issue in question. While the PROTECT Act's *de novo* standard certainly requires

increased scrutiny of some sentencing departures, this Court's precedent dictates that the sentencing judge's conclusions that a departure is justified is still entitled to considerable respect. Indeed, Congress, in using the term "de novo" in the PROTECT Act is deemed to have the *Ornelas* analysis in mind. As this Court has said, "we presume that Congress expects its statutes to be read in conformity with this Court's precedents[.]" *United States* v. *Wells*, 519 U.S. 482, 491, 495 (1997) (omitting citation).

In this case, the failure to afford any deference to the district court's findings was exacerbated by an overly restrictive view of what constitutes a finding of fact. 18 U.S.C. § 3742(e) instructs the court to "accept the findings of fact of the district court unless they are clearly erroneous." Nonetheless, the court of appeals limited that acceptance to what it called "historical facts" (*Thurston*, *supra*, 358 F.3d at 77). It distinguished its limited universe of fact from what it characterized as an ultimate conclusion — "whether a defendant's good works are 'exceptional.'" (*id.*). Accordingly, it gave no deference or weight to the district court's determination that defendant's good works were the most extraordinary the court had seen in over fourteen years of sentencing criminal defendants (*id.*, at 79). *Amici* suggest that for purposes of reviewing the justification for a departure based on a determination that defendant's conduct was "exceptional", the district court's determination was a finding of fact within the meaning of the statute. Moreover, it was the type of comparative evaluation at the heart of determining whether a departure is warranted, placing the defendant's conduct in the context of that of other defendants. It should not have been ignored in reviewing whether the departure was justified by the facts of the case under 18 U.S.C. § 3742(e)(3)(iii).

B. The Statutory Construction of the Court of Appeals Raises Separation of Powers Concerns.

To construe the Congressional imposition of *de novo* review as precluding any deference to the findings of the district court raises separation of powers concerns. Sentencing is primarily a judicial function, the resolution of a "case" or "controversy" entrusted to the judiciary under Article III of the United States Constitution. Removing from the judiciary the authority to determine how that central function will be performed constitutes unwarranted encroachment by the legislative branch. "The constitutional system of checks and balances is designed to guard against 'encroachment or aggrandizement' by Congress at the expense of the other branches of government." *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 83 (1982) (Bankruptcy Reform Act grant of jurisdiction to bankruptcy judges violated Article III of the Constitution). This Court has expressed its intent to ensure "that no provision of law 'impermissibly threatens the institutional integrity of the Judicial Branch'" (*Mistretta* v. *United States*, 488 U.S. 361, 383 (1989)). In *Mistretta*, *supra* this Court rejected a separation of powers challenge to the United States Sentencing Guidelines in part because the Sentencing Commission is located in the judicial branch of the United States government, noting that had the executive been delegated authority to promulgate the guidelines the answer might have been different and quoting 1977 testimony of a Department of Justice official that "[i]f guidelines were to be promulgated by an agency outside the judicial branch, it might be viewed as an encroachment on a judicial function." (*id.*, at 391, n.17).

Whether labeled procedural or substantive, a standard of review can determine the result of a case. *See, e.g.*, *Cooper Industries* v. *Leatherman Tool*, 532 U.S. 424, 441 (2001); *In re Rasbury* v. *IRS*, 24 F.3d 159, 167

(11th Cir. 1994). Interpreting the *de novo* standard of review as a Congressional command precluding any deference to the expertise, experience and special competence of the district court in sentencing encroaches on the judicial function by dictating a standard of review violative of that which this Court has deemed necessary to properly effectuate the judicial function in sentencing.

CONCLUSION

For the foregoing reasons *amici* respectfully request that this Court grant the Petition for a Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the First Circuit in *United States* v. *Thurston*, 358 F.3d 51 (1st Cir. 2004).

Respectfully submitted,

JUDITH H. MIZNER
FEDERAL DEFENDER OFFICE FOR THE
DISTRICT OF MASSACHUSETTS
408 Atlantic Avenue
Boston, MA 02110
(617) 223-8061

For Federal Defender Office for the District of Massachusetts

CHARLES W. RANKIN
RANKIN & SULTAN
One Commercial Wharf, North
Boston, MA 02110
(617) 720-0011

For Criminal Justice Act Board

CAROL BROOK
NATIONAL ASSOCIATION OF FEDERAL
DEFENDERS
P.O. Box 22223
Nashville, TN 37202

For National Association of Federal Defenders

Dated: July 19, 2004